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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB,
Individually and as Representatives of the
Class of Reston, Virginia Homeowners,
Petitioners,

v.

VIRGINIA STATE BAR and FAIRFAX COUNTY
BAR ASSOCIATION,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE BAR OF TEXAS

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INDEX

	Page
QUESTIONS PRESENTED	1
INTEREST OF THE STATE BAR OF TEXAS AS AMICUS CURIAE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE PRACTICE OF A LICENSED AND REGULATED PUBLIC PROFESSION CONSTITUTING A PART OF THE JUDICIAL DEPARTMENT OF THE GOVERNMENT IS NOT "TRADE OR COMMERCE" WITHIN THE SCOPE OF THE SHERMAN ANTITRUST ACT	6
A. The Issue is Not One of "Exemptions" But of Lack of Coverage of a Judicially Governed Learned Public Profession	9
B. Both Predominant Judicial Expressions and Basic Juristic Conceptions Support the Absence of Coverage	10
C. This Court's Decision in *American Medical Association* v. *United States* Relates to the Business of Prepaid Group Health Plans Rather Than the Medical Profession and Is Not Governing	13
D. Present and Future Policy Considerations Both Support Judicial Control Rather Than Antitrust Regulation of the Legal Profession	14
II. MINIMUM FEE SCHEDULES PRINCIPALLY RELATE TO LOCAL LEGAL SERVICES IN PURELY INTRASTATE TRANSACTIONS BEYOND THE COVERAGE OF THE SHERMAN ANTITRUST ACT	17
A. The Purchase of a Home and Other Strictly Local Activities to Which Minimum Fee Schedules Principally Relate Have No Substantial Effect on Interstate Commerce	17
B. Minimum Fee Schedules Should Not in Any Event Receive Federal Antitrust Condemnation, But Coverage Must Be Determined on the Individual Facts of Particular Transactions	19
III. PROMULGATION OF MINIMUM FEE SCHEDULES BY A STATUTORY AGENCY OF THE JUDICIAL DEPARTMENT CONSTITUTES STATE ACTION BEYOND THE SCOPE OF THE SHERMAN ANTITRUST ACT	21

	Page
A. *Parker* v. *Brown* and Subsequent Cases Following It Are Governing	25
B. The Issue Is Not One of Immunity or Exemption But Absence of Coverage	27
C. In Any Event, Primary Jurisdiction Should Be Accorded to the State Supreme Court and Not to the Federal Antitrust Forum	27
D. Judicial Regulation of Statutory or Integrated Bars Should Not Be Imperiled or Displaced by Federal Regulatory Control Through the Federal Antitrust Statutes	28
CONCLUSION	29

TABLE OF AUTHORITIES

Cases

Allstate Insurance Co. v. Lanier, 361 F.(2d) 870 (4th Cir. 1966)	26
American Medical Association v. United States, 317 U.S. 519, 533 (1943)	13
Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 436 (1932)	12
Carter v. American Telephone & Telegraph Company, 365 F.(2d) 486 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967)	27
Chicago Mercantile Exchange v. Deaktor, 414 U.S. 113 (1973)	28
Crain v. Blue Grass Stockyards Co., 399 F.(2d) 868 (6th Cir. 1968)	27
Far Eastern Conference v. United States, 342 U.S. 570 (1952)	27
Federal Baseball Club of Baltimore, Inc. v. National League, 259 U.S. 200, 209 (1922)	19
Gas Light Co. of Columbus v. Georgia Power Co., 440 F.(2d) 1135 (5th Cir. 1971), cert. denied, 404 U.S. 1062 (1972)	26
Locust Cartage Co. v. Trans American Freight Lines, Inc., 430 F.(2d) 334 (1st Cir. 1970)	27
Meat Cutters Union v. Jewel Tea Co., 381 U.S. 676 (1965)	15
The Nymph, 18 Fed. Cas. 506	11, 12

	Page
Parker v. Brown, 317 U.S. 341 (1943)	25, 26
Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973)	28
United States v. National Association of Real Estate Boards, 339 U.S. 485 (1950)	11, 15
United States v. National Society of Professional Engineers, Civ. No. 2412-72 (D.D.C.) (Appendix, Department of Justice Amicus Curiae Brief)	10, 12
United States v. Oregon Medical Society, 343 U.S. 326, 338 (1952)	18
United States v. Oregon State Bar, Civ. No. 74-362 (De. Ore.) (Petitioners' Brief, Addendum B, B-19)	9
United States v. Radio Corporation of America, 358 U.S. 334 (1959)	27
United States v. Western Pacific RR. Co., 352 U.S. 59 (1956)	27
Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.(2d) 248 (4th Cir. 1971)	26
Watts v. MKT RR. Co., 383 F.(2d) 571, 583 (5th Cir. 1967)	28

Statutes and Rules

Art. 320a, Vernon's Texas Civil Statutes	3
Art. 2226, Vernon's Texas Civil Statutes	25
Code of Professional Responsibility, Canon 1	22
Code of Professional Responsibility, Canon 2	22
Code of Professional Responsibility, Canon 2-2	22
Code of Professional Responsibility, Canon 2-16	23, 29
Code of Professional Responsibility, Canons 2-17 and 2-18	24
Code of Professional Responsibility, Canon 2-24	23
Code of Professional Responsibility, Canon 2-25	23
Fair Labor Standards Act, 29 U.S.C. 201, et seq.	14
National Labor Relations Act, 29 U.S.C. 141	14
Sherman Antitrust Act, 15 U.S.C. § 1	5, 17, 18, 25
Solicitors' Act 1957, as amended, 5 & 6 Eliz. 2 Sec. 56	15
Title 14, App. Art. 12, S. 8, Vernon's Annotated Texas Statutes	21
15 U.S.C. § 17	15

Other Authorities

ABA Antitrust Developments 39	20
52 ABA Jn. 1043	16

	Page
56 ABA Jn. 1164	16, 17
58 ABA Jn. 31	16, 18
Brun, Stellung der freien Berufe im Wirtschaftsleben (1930)	7
40 California State Bar Journal 720	16
Carr-Saunders and Wilson, The Professions (1933)	7
Carr-Saunders, The Professions, Their Organization and Place in Society (1928)	7
feuchtwanger, Der Staat und die freien Berufe, Staatsamt oder Sozialamt (1929)	7
Handler, 72 Col. L. Rev. 1, 13 (1972)	26, 27
10 Hawaii Bar Journal 30	16
61 Ill. Bar Jn. 132	24
61 Ill. Bar Jn. 536	16
38 Kentucky Bar Journal 35	16
IV Pound on Jurisprudence 348	7
V Pound on Jurisprudence 676, et seq.	7
V Pound on Jurisprudence 677	9, 13
V Pound on Jurisprudence 680	16
Pound, The Lawyer from Antiquity to Modern Times (1953) 273-275	8
Vol. II, September 1973 Pro Bono Report	16
Smith & Clifton, 52 ABA Jn. 1043 (1966)	17
48 Tex. L. Rev. 285	24
Time, September 16, 1974, "The Law"	17

In The

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No. 74-70

Lewis H. Goldfarb and Ruth S. Goldfarb,
Individually and as Representatives of the
Class of Reston, Virginia Homeowners,
Petitioners,

v.

Virginia State Bar and Fairfax County
Bar Association,
Respondents.

On A Writ Of Certiorari To The United States
Court Of Appeals For The Fourth Circuit

AMICUS CURIAE BRIEF OF THE STATE BAR OF TEXAS

QUESTIONS PRESENTED

This Amicus Curiae respectfully submits that the Questions Presented would be more accurately stated as follows:

1. Does the practice of the learned public profession of law as a licensed member of the Judicial Department of the State under a State Bar statute vesting the governance and regulation of the practice in the Supreme Court of the State to be exercised through the State Bar as an administrative agency constitute "trade or commerce" within the intended application of Section 1 of the Sherman Antitrust Act?

2. Does the performance by a lawyer licensed by and practicing and residing within the State of legal services performed wholly within the State with reference to essentially local matters such as home purchases constitute "trade or commerce among the several states or with foreign countries" within the meaning and application of Section 1 of the Sherman Act?

3. Should minimum fee schedules promulgated by an administrative agency of the Judicial Department of the State in any event be adjudged to violate Section 1 of the Sherman Antitrust Act without any reference to the commerce facts of the particular legal services rendered in individual transactions?

4. Is a minimum fee schedule promulgated by an administrative agency of the Judicial Department of the State with the legal approval of the Supreme Court of the State in the nature of State action which is beyond the ambit and application of the federal antitrust laws?

THE INTEREST OF THE STATE BAR OF TEXAS AS AMICUS CURIAE

The State Bar of Texas desires leave to file this Amicus Curiae Brief in support of the position of the Respondents. Both Petitioners and Respondents have consented to the filing of this Amicus Curiae Brief by letters from their counsel of record to the counsel for the State Bar of Texas which have been filed with the Clerk of the Court.

The State Bar of Texas is a statutory agency of the State of Texas declared by law to be a part of the Judicial Department of the State. The State Bar Act provides that the State Bar, as "an administrative agency of the Judicial Department of the State," shall be governed by a Board of

Directors "composed of the officers of the State Bar, and not more than thirty additional members, elected from geographical Bar Districts by the members of the State Bar." Article 320a, Vernon's Texas Civil Statutes.

The filing of and the positions taken in this Amicus Curiae Brief have been approved by unanimous action of such Board of Directors.

All of the more than 25,000 lawyers licensed by the Supreme Court of Texas are members of the State Bar pursuant to provision of the State Bar Act (Article 320a, *supra*) that "all persons who are now or who shall hereafter be licensed to practice law in this State shall constitute and be members of the State Bar, and shall be subject to the provisions hereof and the rules adopted by the Supreme Court of Texas."

Provision is made for the comprehensive regulation and governance of the practice of law as follows:

> "From time to time, as to the Court may seem proper, the Supreme Court of Texas shall prepare and propose rules and regulations for disciplining, suspending, and disbarring attorneys at law; for the operation, maintenance, and conduct of the State Bar; and prescribing a code of ethics governing the professional conduct of attorneys at law."

Provision is then made for the approval of such rules and regulations by referendum of the membership of the State Bar.

Pursuant to these provisions of the State Bar Act, Article 320a, Vernon's Texas Civil Statutes, *supra,* a comprehensive regulatory scheme governing the State Bar of Texas and its members and regulating the practice of law and the professional conduct of lawyers has been adopted under

such statutory authorities. State Bar Rules and a Code of Professional Responsibility have been approved by the State Bar of Texas and adopted and promulgated by the Supreme Court of Texas.

The State Bar of Texas has officially adopted and promulgated minimum fee schedules now still in effect as an informational guide with it being published thereon:

> "It should be at all times made clear that minimum fee schedules constitute suggestions only as to fees that have generally been found reasonable for particular services. It must be emphasized that such minimum fee schedules are not to be agreed upon and that they are not enforceable. It should be stressed that no attempt will be made to enforce them by disciplinary action, coercion, threats or otherwise. It should also be pointed out that failure to comply with minimum fee schedules does not constitute any violation of the canons of ethics. This statement is in accord with the views expressed by the Antitrust Division of the United States Department of Justice."

The State Bar of Texas is committed to the maintenance of minimum fee schedules and is accordingly vitally interested in clarifying their validity under the Sherman Antitrust Act.*

SUMMARY OF ARGUMENT

Lawyers are officers of the court. Admission to the practice of the profession, rules of practice and standards of conduct, and duties to the court and to the public are governed by the judiciary and not by the antitrust laws.

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* The antitrust attacks being made on minimum fee schedules imply that they constitute a dangerous recent innovation. They are in fact of more ancient origin than the Sherman Act. One in the archives of the State Bar of Texas adopted by the Belton, Texas Bar Association bears a date of December 11, 1882. The recent innovation is the antitrust attack on their long unquestioned validity.

The Virginia State Bar, like the State Bar of Texas, is a statutory agency of the Judicial Department of the state government. The practice of this statutory public profession, which is comprehensively regulated and governed by the judiciary with the aid of its statutory agency, is not "trade or commerce among the several States, or with foreign nations" within the scope and intendment of the Sherman Antitrust Act, 15 U.S.C. § 1. The issue is not the existence *vel non* of an "exemption" or "immunity" from the statute extended to an elite "learned profession" but of the reach and coverage of the antitrust statute.

In addition to the juristic truth that the pursuit of a public profession by officers of the Judicial Department of government is not "trade or commerce" within the coverage of the antitrust laws, the promulgation of minimum fee schedules by an administrative agency of the Judicial Branch of state government constitutes *state action* beyond the ambit of the antitrust statutes. It is again not an issue of "exemption" or "immunity" but of lack of coverage. If not regarded as "state action" beyond the reach of the Sherman Act, at the very least primary jurisdiction of any attack on the validity of minimum fee schedules would be reposed in the State Supreme Court and its statutory agency who developed and adopted them.

Even if the pursuit of a regulated public profession was "trade or commerce" and its governance and regulation by a statutory agency of the Judicial Department of state government was not state action, the rendition entirely within the state by a local lawyer of purely local legal services for local citizens in matters entirely situated within the state, such as generally covered by minimum fee schedules, does not constitute "trade or commerce *among the several States or with foreign nations*" so as to be within the reach and coverage of the Sherman Antitrust Act. Public profession

and state action considerations aside, Sherman Act application to minimum fee schedules still could not be determined on a blanket basis but would have to be adjudicated on the interstate or intrastate facts of the individual transaction and the particular legal service preformed to which a specific fee in the schedule may have been applied. Home buying is peculiarly local. Most legal services covered by minimum fee schedules constitute local law practice for local people on local matters strictly within the state. Here the antitrust plaintiff's attempted reach must surely exceed his grasp. A blanket federal antitrust condemnation of state bar minimum fee schedules as such would ignore normal commerce considerations in determining federal antitrust application. Assuredly federal antitrust jurisdiction would in no event be so imprecisely adjudicated.

ARGUMENT

I.

THE PRACTICE OF THE LEARNED PROFESSION OF THE LAW TO WHICH MINIMUM FEE SCHEDULES APPLY IS NOT "TRADE OR COMMERCE" COVERED BY THE SHERMAN ANTITRUST ACT.

The practice of the learned, licensed and judicially regulated profession of the law is a public profession by reason of the Virginia statute, which, like the Texas statute and that in thirty other states, establishes a State Bar as an administrative agency of the Judicial Department of the State of which all licensed lawyers of the State are members. Such lawyers are therefore public officers of the Judicial Department of the State. Practice of the law as a member of the Judicial Department of the State is therefore necessarily the pursuit of a learned public profession.

The characteristics of the legal profession are such as to constitute it a public profession, even in the absence of a statute making it such.

Dean Pound stated this truth as a General Juristic Conception at IV *Pound on Jurisprudence* 348 as follows:

> "A profession is a body of men pursuing a common calling as a learned art and as a public service[459] — no less a public service if it is at the same time an individual means of livelihood. It is, therefore, an important social institution. Security of the institution demands that its efficient functioning be maintained. Hence where general rules of law carried out fully would interfere with this the social interest is secured by privilege."

The lucid and lofty juristic conception of the legal profession stated by this timeless sage and scholar of the law should be set out as a backdrop for the determination of the issue of whether the practice of law is to be regarded as "trade or commerce." This is the deathless statement of it at V *Pound on Jurisprudence* 676, *et seq.*:

> "(ii) Nature and definition of a profession. Historically, the practice of law is a profession. It must remain a profession if the purposes of representation in litigation as part of the machinery of justice are to be achieved. A profession is a group of men pursuing a learned art as a common calling in the spirit of public service — no less a public service because incidentally it may be a means of livelihood. The exigencies of the economic order require most persons to gain a livelihood and the gaining of a livelihood is a purpose to which they are constrained to devote their activities. But while in all walks of life man must bear this in

[459] Carr-Saunders and Wilson, The Professions (1933); Carr-Saunders, The Professions, Their Organization and Place in Society (1928); Feuchtwanger, Der Staat und die freien Berufe, Staatsamt oder Sozialamt (1929); Bruno, Die Stellung der freien Berufe im Wirtschaftsleben (1930).

mind, in business and trade it is the primary purpose. In a profession, on the other hand, it is an incidental purpose, pursuit of which is held down by traditions of a chief purpose to which the organized activities of those pursuing the calling are to be directed primarily and by which the individual activities of the practitioner are to be restrained and guided.

* * * *

Next to the idea of public service the important ideas in a profession are organization and pursuit of a learned art. The condition of an unorganized body of lawyers which obtained in the United States in the nineteenth century gave to bar associations in the decadence of professional organization something of the look of trade associations or of dinner clubs. This was the lingering effect of a general movement to deprofessionalize the traditionally professional callings and put all callings in one category of money-making activities which was characteristic of frontier modes of thought in the formative era of our institutions. After formal organization lapsed or all but disappeared the lawyer's tradition of solidarity and traditional incidents of professional organization which survived were of real value for our administration of justice. But the ideal of the profession involves an inclusive and responsible organization toward which we have been moving back steadily since the revival of bar associations in the last third of the nineteenth century and more rapidly since the first quarter of the present century in the development of the integrated bar in more than half of the states.[7]

But in its idea and in its history a profession is a body of learned men pursuing a learned art. Learning is one of the qualities which sets off a profession from a vocation or occupation. Professions are learned from the nature of the art professed. But they have also a cultural ideal side which furthers the exercise of the

[7] See the list in Pound, The Lawyer from Antiquity to Modern Times (1953) 273-275.

> art. Problems of human relations in society, problems of disease, problems of the upright life guided by religion are to be dealt with by the resources of cultivated intelligence by lawyer, physician and clergyman."

Religion, medicine and law are not "trade or commerce" because, under our system of law growing out of Judeo-Christian conceptions, man born in the image of his Creator is not a commodity. Practitioners of medicine and religion who minister to his spirit, mind and body are not thereby engaged in "trade or commerce." The priesthood of the law in protecting man as attorney and advocate in his "life, liberty and pursuit of happiness," and in his Constitutional, statutory and common law rights of person and property, is not just a part of the stream of "trade or commerce."

The Amicus Curiae Brief of the United States Department of Justice by denigrating the lawyer to "a self-employed businessman" or an "independent entrepreneur of legal services" (Brief, pp. 12-13) in its effort to make law practice "trade or commerce" becomes part of what Dean Pound described as "a general movement to deprofessionalize the traditionally professional callings and put all callings in one category of money-making activities which was characteristic of frontier modes of thought in the formative era of our institutions." V *Pound on Jurisprudence* 677.

A. The Issue Is Not Exemption But Coverage.

The Petitioner, the Amicus Curiae Brief of the Department of Justice, and the District Court in *United States* v. *Oregon State Bar*, Civil No. 74-362 (D. Ore.) (Petitioners' Brief, Addendum B, B-19), commit the common error of declaring the minimum fee schedule to violate the Sherman Antitrust Act because the Court cannot "create" or "forge"

a "new exemption" to the statute. Their mutual mistake is that the *issue of exemption* is not reached until *coverage* has first been found. No question of *"exemption" arises until the subject matter of law practice is first held to be "trade or commerce"* because that is all to which § 1 of the Sherman Act applies. The error is compounded by looking to the derided "commercial nature" of the *fee* as determinative of coverage rather than to the *legal service* which the fee compensates. A clergy agreement upon minimum *honoraria* for conducting baptismal, marital and funeral services would not fall beyond the antitrust ambit because there is an implied exemption of the prices for such professional services, but because the performance of these holy rites by a man of the cloth is not "trade or commerce." The nature of the service performed and not the nature of the compensation for it is determinative of coverage. It requires this double error of transposing *exemption* and *coverage* and of testing by *price charged* instead of by *service rendered* to reach the conclusion that minimum fees on legal services contravene the Sherman Act proscriptions against restraint of "trade or commerce."

B. Predominant Judicial Expressions and Basic Juristic Conceptions Support the Absence of Coverage.

The District Court in *United States* v. *National Society of Professional Engineers*, Civ. No. 2412-72 (D.D.C.) (Appendix, Department of Justice Amicus Curiae Brief) not only erroneously fears "a dangerous form of elitism • • • to dole out exemptions to our antitrust laws merely on the basis of educational level • • • or the impact which the profession has upon society's health and welfare," but also entirely misses the sharp line of delineation between highly educated call-

ings and learned professions drawn at V *Pound on Jurisprudence* 677 as follows:

> "A profession, such as the ministry, medicine, law, teaching, is much more than a calling which has a certain traditonal dignity. Certain other callings in recent times have achieved or claim a like dignity, but lack the essential primary purpose. For example, if an engineer discovers a new process or invents a new mechanical device he may obtain a patent and retain for himself a profitable monopoly. If, on the other hand, a physician discovers a new specific for a disease or a surgeon invents a new surgical procedure they each publish their discovery or invention to the profession and so to the world. If a lawyer has learned through research or experience something useful to the profession and so to the administration of justice he publishes it in a legal periodical or expounds it before a bar association or in a lecture to law students. It is not his property. He may publish it in a copyrighted book and so have rights to the literary form in which he put it. But the process or method or developed principle he has worked out belongs to the world."

The Justice Department Brief (p. 30) argues that some legal services are "available from other sources, such as real estate brokers and title companies," and that because these non-lawyer competitors are subject to the Sherman Act under *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, lawyers must be as well. Such is not the case unless the real estate broker or the title company is unlawfully engaged in the unauthorized practice of law. The contention is further exploded by the *Real Estate Boards* decision which delineates between a trade and a profession by quoting with approval from Justice Story in *The Nymph*, 18 Fed. Cas. 506, this decisive principle:

> "Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, *not in the liberal arts or in the learned professions*, it is constantly called a trade." (Emphasis supplied). 339 U.S. 490.

The opinion, at p. 492, pinpoints the basis of Sherman Act coverage for real estate brokers:

> "Their activity is commercial and carried on for profit."

The Court had earlier followed the principle asserted by Justice Story and quoted the same language from *The Nymph* as decisive, including the sentence:

> "In the first place, the word 'trade' is often and, indeed, generally used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile."

There is an express exclusion from the coverage of this definition of those engaged "in the liberal arts or in the learned professions." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 436. It is made clear that the definition of "trade" is not to be extended by the declaration at p. 437 that Justice Story had defined the word "in the general sense" and by "broad" definition.

Indeed the distinction is perceived by the D.C. District Court in *United States of America* v. *National Society of Professional Engineers, supra*, which states:

> "Unlike the lawyer's brief or the scholar's text which convey thought, an engineer's blueprints constitute a necessary physical tool which combined with standardized techniques of manufacturing and construction, yield a final, functional reduction to practice. In this regard, professional engineering enjoys a maximum interface within the products of construction and manufacture. * * * This is not a case of indirect and insubstantial impact by a so-called learned profession upon interstate commerce." (Department of Justice Brief, Appendix 9a-10a).

The Department of Justice desires to subject law practice to the Sherman Act for "the ultimate purpose" of "preservation of competition" (Department of Justice Amicus Curiae Brief, p. 25). The precise and powerful answer to the Antitrust Division bid for lawyer price competition is phrased at V *Pound on Jurisprudence* 677 as follows:

> "There is no such thing as competition for clientage in a profession. Every lawyer should exert himself fully to do his tasks of advice, representation, and advocacy to the best of his ability. But competition with fellow members of the profession in any other way is forbidden. Competition belongs to activities which are primarily acquisitive. It is not allowable in those primarily for public service."

C. American Medical Association v. United States Relates to Prepaid Group Health Plans Rather Than Practice of Medicine And Is Not Controlling.

Petitioners argue that *American Medical Association* v. *United States*, 317 U.S. 519, is controlling on the question of law practice constituting "trade or commerce" despite the clear declaration of the Court on antitrust coverage of the learned professions at page 528 that "we need not consider or decide this question." The Court held that a conspiracy between a medical association and certain physicians to restrain, binder and obstruct the business of Group Health Association, Inc., an incorporated cooperative whose members made prepayments to a plan under which they jointly procured health and hospital services, constituted "a single conspiracy to obstruct and restrain the business of Group Health" and that "the calling or occupation of the individ-

ual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of Group Health." The charged conspiracy aimed restraints at a business outside of the profession. A comparable case would be a conspiracy of a bar association and its lawyer members to restrain, hinder or destroy the *outside* lawful business of a title company or a group legal services plan. The decision expressly does not govern the adoption of a minimum fee schedule *within* the legal profession.

The distinction is implicit in the Court's approving quotation of the trial court jury charge as follows:

> "If it be true ... that the District Society, acting only to protect its organization, regulated fair dealing among its members, and to maintain and advance the standards of medical practice, adopted reasonable rules and measures to those ends, not calculated to restrain Group Health, there would be no guilt, though the indirect effect may have been to cause some restraint against Group Health." (317 U.S. 533).

D. Present and Future Policy Considerations Both Support Judicial Control Rather Than Antitrust Regulation of the Legal Profession.

Repeated Congressional recognition of the policy need for separate treatment of the professions in federal regulatory statutes has been of such long standing as to be regarded as historic. Professional employees are exempt from the Fair Labor Standards Act because their compensation is unrelated to hours of work. 29 U.S.C. 201, et seq. They are segregated in separate units under the National Labor Relations Act. 29 U.S.C. 141. Professional services have been uniformly excluded from both state and federal competitive bidding statutes. In England minimum fees for solicitors

are regulated by orders issued under the Solicitors' Act of 1957, as amended, 5 & 6, Eliz. 2 Sec. 56.

In truth there are deep and broad concepts of public policy which point to the removal of all labor of the hand or of the head from the strictures of the antitrust laws. Collective action on wages and salaries is relieved from antitrust prohibitions as a matter of policy by 15 U.S.C. § 17 because "The labor of a human being is not a commodity or article of commerce." See *Meat Cutters Union* v. *Jewel Tea Co.*, 381 U.S. 676. In discussing antitrust immunity of combinations to fix rates of pay, Mr. Justice Jackson, dissenting in *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, *supra*, at 496, said:

> "I suppose this immunity is not confined to those whose labor is manual, and is not lost because the labor performed is professional."

At this advanced stage of proven development the statutory state bar, unified as an integrated part of the Judicial Department of the State, surely must be established as sound public policy. A concomitant part of that policy is the government and regulation exclusively by the Judiciary through its statutory agency of the practice of law as a public profession, including admissions, discipline, ethics, codes and standards of professional conduct, and all like important areas including attorneys' fees. Out of this policy has developed far reaching programs of supplying legal services to the indigent, of developing more readily available and more economical legal services for middle income groups through group legal service plans, the advancement of paralegal assistants and the development of specialization as aids to more competent, efficient and economical legal services, the extensive development of lawyer referral services to make legal services more accessible to the pub-

lic, and growing impetus for many other professional developments for the better service of the public.*

Along with this vital policy development of a public profession governed by the Judiciary through a statutory state bar as its agency, there has developed a countermovement for the deprofessionalization and the federalization of the legal profession. Its present major thrust, among various others that await in the wings, is the federal antitrust attack on minimum fee schedules. It is respectfully submitted that displacing state judicial control of this area of law practice by the imposition of antitrust proscriptions applicable to "trade or commerce" would be deeply disruptive to this advanced public policy and a tremendous step backwards to what Dean Pound more than twenty years ago termed "a general movement to deprofessionalize the traditionally professional callings and put all callings in one category of money-making activities which was characteristic of frontier modes of thought in the formative era of our institutions." He followed with the prophetic warning in V *Pound on Jurisprudence* 680:

> "Today the idea of a profession is again seriously threatened. * * * Moreover, the endeavor of many callings today to be classed as professions, although primarily money-making in purpose and spirit, must be taken into account. The movement to elevate the standards of business and of all callings is a worthy one. But in elevating these, vigilance is needed that the purpose is not achieved by pulling down the standards of the old recognized professions to a common level with the newer ones."

A judgment for the Petitioners in this case would go far toward such a "pulling down."

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* 40 *California State Bar Journal* 720; 61 *Illinois Bar Journal* 536; 10 *Hawaii Bar Journal* 30; Vol. II Sept. 1973 *Pro Bono Report;* 58 ABA Jn. 31 (on the merits of minimum fee schedules); 56 *ABA* Jn. 1164; 52 *ABA* Jn. 1043; 38 *Kentucky Bar Journal* 35.

II.

MINIMUM FEE SCHEDULES PRINCIPALLY RELATE TO LOCAL LEGAL SERVICES IN PURELY INTRASTATE TRANSACTIONS BEYOND THE COVERAGE OF THE SHERMAN ANTITRUST ACT.

Even if the practice of law be cynically regarded as mere "trade or commerce," the legal services to which minimum fee schedules generally apply still do not relate to transactions substantially affecting "trade or commerce among the several States or with foreign nations" within the reach and application of § 1 of the Sherman Act. Generally there will in no event be Sherman Act coverage because both the legal service and the transaction to which it relates will be strictly intrastate with no substantial effect on interstate or foreign commerce. Minimum fee schedules viewed in their entirety predominantly relate to matters in strictly intrastate commerce and beyond even "the farthest reaches of the commerce power."

A. The Legal Services To Which Minimum Fee Schedules Apply Are Generally Strictly Intrastate And Without Substantial Effect on Interstate Commerce.

Speaking in a different context, the Department of Justice Amicus Curiae Brief effectively admits the essentially local and intrastate character of minimum fee schedules in their application by such pronouncements as these:

> "Not surprisingly, fee schedules appear to be used most heavily by low-income lawyers."*

> "The primary impact of minimum fee schedules is upon small businesses and middle income individuals,

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* *Time,* Sept. 16, 1974, states in "The Law" that "about three-quarters of the private attorneys in the U.S. work in offices that have three lawyers or fewer." Smith and Clifton, 52 ABA Jn. 1043 (1966), put it at 83%. A 1970 ABA survey put lawyer median annual income at $21,260, 56 ABA Jn. 1164.

who only occasionally use legal services. Proponents of such fee schedules assert that they are most useful 'in routine affairs that affect the individual: divorce, adoption, sale of a home, probating a smaller estate or routine appearance in court.' Miller & Weil, Let's Improve, Not Kill, Fee Schedules, 58 A.B.A. 31, 32 (1972). Such schedules also typically cover transactions likely to be encountered by small businesses, such as creation and dissolution of partnerships and corporations, bill collection, minor litigation, foreclosure and bankruptcy. See Arnould & Corley, *supra*, 57 A.B.A.J. at 657.

"By contrast, legal services for large enterprises and persons of wealth tend to be unaffected by minimum fees • • •."

Strong authority that the essentially personal and local legal services covered by minimum fee schedules do not substantially affect interstate commerce so as to fall within the coverage of § 1 of the Sherman Act is *United States* v. *Oregon Medical Society*, 343 U.S. 326, in which the Department of Justice claimed § 1 and § 2 Sherman Act violations through monopoly of group prepaid medical care plans and restriction of competition in group prepaid medical care plans by the defendant state medical society and defendant county medical societies sponsoring such plans. In sustaining a finding that such plans did not substantially affect interstate commerce under the Sherman Act, the opinion by Mr. Justice Jackson states at 343 U.S. 338:

"Almost everything pointed to in the record by the Government as evidence that interstate commerce is involved in this case relates to across-state-line activities of the private associations. It is not proven, however, to be adversely affected by any allocation of territories by doctor-sponsored plans. So far as any evidence brought to our attention discloses, the activities of the latter are wholly intrastate. The Government

did show that Oregon Physicians Service made a number of payments to out-of-state-doctors and hospitals, presumably for treatment of policy holders who happened to remove or temporarily be away from Oregon when need for services arose. These were, however, few, sporadic and incidental."

The principle that the peripheral interstate facets of a local title examination by a local lawyer on the local purchase of a local home do not convert the transaction into one substantially affecting interstate commerce within the coverage of the Sherman Act seems to be recognized in the declaration in *Federal Baseball Club of Baltimore, Inc.* v. *National League*, 259 U.S. 200, 209, that: "A firm of lawyers sending out a member to argue a case • • • does not engage in commerce because the lawyer goes to another state."

B. Antitrust Law Coverage Must in Any Event Be Determined on Commerce Facts of Individual Transactions and Not on a Blanket Basis.

Despite the fact that only the particular individual facts of the Goldfarb home purchase are in evidence or in issue, both the Petitioners by an attempted class action device and the Justice Department in its amicus curiae brief appear to seek a blanket antitrust condemnation of minimum fee schedules *per se* without any reference to the particular commerce facts of individual transactions to which items in the minimum fee schedule may be applied. It is basic to the Sherman Act that coverage is tested on the commerce facts of particular transactions and not on a blanket basis by the general nature of a business, industry or profession.

Since the briefs in favor of the Petitioner here concede that the transactions in issue are not in the "stream of

commerce", the determination of coverage in any event has to be made "under the 'affecting commerce' or quantitative test, where the issue is whether the effect on commerce is significant." The quantitative test can only be applied on the basis of the particular commerce facts of an individual transaction to which a particular minimum fee provision is applied. ABA *Antitrust Developments* 39.

Is antitrust coverage *even arguable* where one local resident conveys a home to another local resident and title examination and conveyancing is done by a local lawyer in an all cash transaction or by the seller individually carrying the mortgage loan or where the mortgage involves no out-of-state lender or guarantor? What have the peripheral and remote interstate facets of the Goldfarb home purchase to do with the defense of a state criminal case or municipal traffic ticket, the drafting and probating of the will of a local citizen involving no out-of-state property, a divorce between two local residents with no out-of-state property involved, or a myriad of other purely local transactions having no interstate aspects whatever to which minimum fee schedules are applied?

The judicial process is not well served by seeking a broad brush antitrust obliteration of minimum fee schedules in their entirety in total disregard of the fact that their particular provisions are generally applied to transactions having no interstate aspects whatever. Seemingly such gross imprecision in adjudication should not be countenanced.

Petitioners concede the rubric that "determinations of commerce questions under the Sherman Act must be resolved on a case-by-case basis" (Petitioners' Brief p. 48). Yet Petitioners move from that to seeking blanket treatment of all of the cases of all of the home buyers in the

"bedroom communities" for northern Virginia. Both Petitioners and the Department of Justice then seem to vault from that bootlift level to a third plateau with a plea for a sweeping, all-inclusive antitrust adjudication condemning all minimum fee schedule provisions in all individual cases now or hereafter, though the facts of such individual cases involve neither home purchases nor northern Virginia and are neither in evidence nor in issue. This surely must be wholly impermissible.

III.

VIRGINIA MINIMUM FEE SCHEDULES ARE THE PRODUCT OF STATE ACTION BY THE VIRGINIA STATE BAR AS A STATUTORY AGENCY OF THE SUPREME COURT OF VIRGINIA AND ARE NOT WITHIN THE APPLICATION OF THE SHERMAN ANTITRUST ACT.

Not only is the Virginia State Bar, like the State Bar of Texas, a statutory agency of the Supreme Court of the State and a part of its Judicial Department, but the adoption of minimum fee schedules by official action of the agency and promulgation by the Supreme Court constitutes State action to which the Sherman Antitrust Act simply does not apply.

In addition to its statutory status as an agency of the Supreme Court of the State and its official role in enforcement of Disciplinary Rules having the force of law, the State action role of the Virginia State Bar, like that of the State Bar of Texas,* has been made clearer still by the official adoption by the State Bar and the official promulgation by the Supreme Court of a comprehensive Code of Professional Responsibility having the force of law. The basic commitment of the State Bar to the ready availability

* Title 14, App. Art. 12, S. 8, *Vernon's Annotated Texas Statutes.*

of competent legal services to all its citizens is embodied in the very first statement in Canon 1 of the Code of Professional Responsibility:

> "A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence."

This legal declaration of professional duty to the public is expanded upon in Canon 2 as follows:

> "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available. The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available."

The professional duty as a matter of law of the legal profession to carry on public information and education programs for the benefit of the citizens is clearly and firmly asserted in Canon 2-2 as follows:

> "The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers acting under proper auspices should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of permissible activities include preparation of institutional advertisements and professional articles

> for lay publications and participation in seminars, lectures, and civic programs."

The Code deals comprehensively with the ethical standards to be employed in determining reasonable attorneys' fees and is unequivocal in its mandate for the provision of competent and adequate legal services in those circumstances where the client is not able to pay such a reasonable fee. Canon 2-24 recognizes that:

> "Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors."

Under these circumstances, it is declared in Canon 2-16:

> "Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain legal services, and lawyers should support and participate in ethical activities designed to achieve that objective."

The lawyer's obligation to see that legal services are not denied to any citizen because of inability to pay a reasonable fee is stated in Canon 2-25 as follows:

> "Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional work load, should find the time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need.

> Thus, it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, Lawyer Referral offices, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services."

Commentators have agreed than Canon 2 as quoted above "is a near-radical departure from familiar ethical principles; its axiomatic statement that the legal profession has an affirmative 'duty to make legal counsel available' to the general public, with its corollary that a lawyer has a duty to assist the profession in fulfilling its duty, is new to the legal profession." 61 *Ill. Bar Jn.* 134; 48 *Tex. L. Rev.* 285.

The Code also provides the governing principles in the determination of reasonable attorneys' fees for those able to pay in Canon 2-17 and 2-18 as follows:

"EC 2-17. The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC-18. The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees. * * * *"

No amount of attenuated reasoning can escape the fact that the adoption by a statutory agency and the promulgation by the Supreme Court of such fee schedules to "provide some guidance on the subject of reasonable fees" constitutes state action.* The Code of Professional Responsibility states a body of law governing the legal profession and of the lawyer in the discharge of the duty of this public profession to provide through its public officer members legal services to the members of the public and the duties of those officers of the court in determining the reasonable fees to be charged to those able to pay. It is in this context of a code of law governing the profession and its members that fee schedules are promulgated in the light of the declared duties of the profession and its members. Undergirding this structure are Disciplinary Rules having the force of law and a statutory agency with the lawful duty and the lawful power to enforce them.

A. Parker v. Brown is Controlling.

Such state action is not within the application of Section 1 of the Sherman Act under *Parker* v. *Brown,* 317 U.S. 341, and the array of cases folowing and reenforcing its rule that state action through a statutory agency, even though it be in the nature of self-regulation, is beyond the federal

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* Article 2226, *Vernon's Texas Civil Statutes* expressly adopts State Bar Minimum Fee Schedules as follows: "The amount prescribed in the current State Bar Minimum Fee Schedule shall be prima facie evidence of reasonable attorney's fees. The court, in non-jury cases, may take judicial knowledge of such schedule and of the contents of the case file in determining the amount of attorney's fees without the necessity of hearing further evidence."

antitrust ambit. In *Parker* v. *Brown* raisin producers proposed production and sales quotas and adopted them by referendum but they were approved by the statutory Commission, just as minimum fee schedules are adopted pursuant to referendum by the statutory agency and in addition promulgated by the Supreme Court. It is state action to which federal antitrust laws do not apply because:

> "It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy....
>
> The state in adopting and enforcing the prorate program made no contract or agreement and it entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."

On the authority of *Parker* v. *Brown*, insurance rates proposed by a rating bureau composed of insurance companies subject to approval by the State Commissioner of Insurance did not violate the Sherman Act. *Allstate Insurance Co.* v. *Lanier*, 361 F. (2d) 870 (4th Cir. 1966). Reduced rates for all-electric homes to exclude the competition of gas proposed by the electric company and approved by the State Corporation Commission did not violate the Sherman Act because it was state action. *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F. (2d) 248 (4th Cir. 1971); *Gas Light Co. of Columbus* v. *Georgia Power Co.*, 440 F. (2d) 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972). *See* Handler, 72 Col. L. Rev. 1, 13 (1972).

B. The Issue Is Not Exemption or Immunity But Absence of Coverage.

Briefs by Petitioners and the Department of Justice again both miss the mark in arguing against implied exemptions or immunities. No issue of exemption or immunity is even involved. Where a state action is present, federal antitrust coverage is simply absent. Professor Handler puts it that "the exception from antitrust coverage applies whenever the pertinent state statute provides for ultimate governmental control, regardless of the manner in which the regulatory agency has carried out its duties." *Id.* 13.

C. Primary Jurisdiction of the State Supreme Court and Its Statutory Agency Should in Any Event Apply.

Even if this were not such a clear case of state action beyond the scope of the Sherman Act, it would appear that primary jurisdiction should be accorded to the State Supreme Court which promulgated the minimum fee schedules adopted by its statutory agency which governs and regulates the legal profession. Any attack on the minimum fee schedules as invalid, unlawful, anticompetitive or unreasonable should first be made there rather than in the antitrust forum of the federal court.

Far Eastern Conference v. *United States*, 342 U.S. 570 (1952); *United States* v. *Western Pacific RR. Co.*, 352 U.S. 59 (1956); *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959); *Carter* v. *American Telephone & Telegraph Company*, 365 F. (2d) 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967); *Crain* v. *Blue Grass Stockyards Co.*, 399 F. (2d) 868 (6th Cir. 1968), and *Locust Cartage Co.* v. *Trans American Freight Lines, Inc.*, 430 F. (2d) 334 (1st Cir. 1970), constitute part of a long-established line of cases currently culminating in the late

decisions of this Court in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973), and *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973), all invoking and applying primary jurisdiction of the federal or state regulatory agency so as to stay what has been termed "piece-meal, sporadic decisions by courts" which it is declared "should not interfere with or bypass the statutory schemes." *Watts* v. *MKT RR. Co.*, 383 F. (2d) 571, 583 (5th Cir. 1967).

In the *Ricci* case, the Court describes the primary jurisdiction process as being "where the regulatory regime is administered by an agency, the Antitrust Court will stay its hand to permit institution of administrative proceedings if they are 'likely to make meaningful contribution to the resolution of this lawsuit.'" 409 U.S. 396. It would seem to be implicit in the primary jurisdiction philosophy that at the very least the antitrust court should stay its action and defer primary consideration of any attack on the minimum fee schedules as being anticompetitive, unreasonable or unlawful to the State Supreme Court whose statutory agency developed them after which "the Antitrust Court will be in a position to make a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the [statutory agency] permits." *Id.* 409 U.S. 307-308.

D. Judicial Rather Than Antitrust Regulation of the Legal Profession Should be Preferred.

The salutary, progressive and wholesome process of regulation by the courts of their own officers and government of the legal profession by the judiciary, which is a rapidly developing rather than a merely emerging reform, should not be impeded or disrupted by the intervention of federal antitrust regulation by lawsuit.

CONCLUSION

The minimum fee schedules in issue are a part of the state judicial regulatory scheme implementing the Disciplinary Rules and the Code of Professional Responsibility, including Canon 2-16:

> "The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them."

The laborer in the law "is worthy of his hire." The involvement of lawyer livelihood does not warrant abandoning the grandeur of the Pound conception of the profession for the culturally arid and drouth bitten concept of law practice as shabby and greedy fee grubbing.

The law practice which the minimum fee schedules cover is not "trade or commerce." If it were so regarded, the legal services to which the minimum fee schedules most generally apply would not substantially affect interstate commerce so as to permit federal antitrust coverage. This in any event would have to be determined on a case-by-case basis from the individual commerce facts of particular transactions to which a particular provision of the minimum fee schedules might be applied. Such minimum fee schedules are the product of state action and hence beyond the antitrust ambit. The Court of Appeals correctly left the government and regulation of the legal profession, including minimum fee schedules, with the State Supreme Court and its

statutory agency where they have been reposed by state law and properly belong. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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January, 1975

PROOF OF SERVICE

I, John Leroy Jeffers, attorney for the State Bar of Texas, Amicus Curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ..... day of January, 1975, I served three copies each of the foregoing Amicus Curiae Brief of the State Bar of Texas on the several parties to this action, as follows:

On Lewis H. Goldfarb and Ruth S. Goldfarb, Petitioners, Virginia State Bar, Respondent, and Fairfax County Bar Association, Respondent, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to their respective attorneys of record, at their addresses of record, as follows:

(1) To Alan B. Morrison, Esquire, attorney for Petitioners, 2000 P Street N.W., Suite 700, Washington, D.C., 20036;

(2) To Stuart H. Dunn, Esquire, Assistant Attorney General, Commonwealth of Virginia, attorney for Respondent Virginia State Bar, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia, 23219; and

(3) John H. Shenefield, Esquire, attorney for Respondent Fairfax County Bar Association, c/o Hunton, Williams, Gay & Gibson, P. O. Box 1535, Richmond, Virginia, 23212.

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